

APPEAL NO. 032911
FILED JANUARY 2, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 16, 2003, and October 2, 2003. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury to her right ankle on _____; (2) the appellant (carrier) is not relieved from liability for this claim under Section 409.002, because the claimant timely notified his employer of an injury pursuant to Section 409.001; (3) the claimant had disability from March 7, 2003, through the date of the hearing; (4) the carrier's defense on compensability is limited to the issue of notice contained in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed on March 10, 2003; and (5) the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The carrier appeals these determinations, essentially on sufficiency of the evidence grounds. The claimant did not file a response.

DECISION

Affirmed in part and reversed and rendered in part.

INJURY, NOTICE, AND DISABILITY

The hearing officer did not err in making the complained-of injury, notice, and disability determinations. These determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

CARRIER'S DEFENSE

The hearing officer did not err in determining that the carrier's defense on compensability is limited to the issue of notice contained in the TWCC-21 filed on March 10, 2003. Section 409.022(b) provides that the grounds for refusal specified in the TWCC-21 constitute the only basis for the carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date. See *also* Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994. It is well settled that "magic words are not necessary to contest the compensability" under Section 409.022. Texas Workers' Compensation Commission

Appeal No. 941755, decided February 13, 1995 (quoting Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993). Rather, we "look to a fair reading of the reasoning listed to determine if the [contest] is sufficient." *Id.* In the present case, the carrier's TWCC-21 provides, "The carrier respectfully dispute [sic] liability of the injury since the claimant failed, without good cause, to timely file a claim for compensation [sic] with the Texas Workers' Compensation Commission within 30 days of the date of injury." In the absence of newly discovered evidence and in view of the applicable law, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain, supra.*

CARRIER WAIVER

The hearing officer erred in determining that the carrier waived its right to contest the claimant's injury under Section 409.021. Section 409.021 provides, in pertinent part, that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission and the employee in writing of its refusal to pay benefits. See *also* Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, citing *Continental Cas. Co. v. Downs*, 81 S.W.3d 803 (Tex. 2002). We have said that a dispute of the timeliness of notice to the employer under Section 409.001 is a dispute to "compensability" under Section 409.021. See Texas Workers' Compensation Commission Appeal No. 002862, decided January 25, 2001. The parties, in this case, stipulated that the carrier received written of the claimant's injury on March 6, 2003. The carrier did not agree to pay benefits but filed a dispute on March 10, 2003, as discussed above, on the basis that the claimant failed to timely notify her employer of an injury. Accordingly, we reverse the hearing officer's waiver determination and render a decision that the carrier did not waive its right to dispute the claimed injury under Section 409.021. Notwithstanding, the carrier's dispute of the claimed injury is limited to the issue of notice contained in the TWCC-21 filed on March 10, 2003, consistent with our decision above.

The hearing officer's decision is affirmed in part and reversed and rendered in part, consistent with our decision above.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.**

Edward Vilano
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge